ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 124, and 125

[FRL 1453-5]

Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes consolidated permit program requirements governing the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), the National Pollutant Discharge Elimination System (NPDES) program and State Dredge or Fill ("404") programs under the Clean Water Act (CWA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act, for three primary purposes:

(1) To consolidate program requirements for the RCRA and UIC programs with those already established for the NPDES program.

(2) To establish requirements for State programs under the RCRA, UIC, and Section 404 programs.

(3) To consolidate permit issuance procedures for EPA-issued Prevention of Significant Deterioration permits under the Clean Air Act with those for the RCRA, UIC, and NPDES programs.

DATES: These regulations shall become effective as follows: All regulations shall become effective as to UIC permits and programs July 18, 1980, but shall not be implemented until the effective date of 40 CFR Part 146. All regulations shall become effective as to RCRA permits and programs November 19, 1980. Part 124 shall become effective as specified in § 124.21. All other provisions of the regulations shall become effective July 18, 1980. For purposes of judicial review under the Clean Water Act, these regulations will be considered issued at 1 p.m. eastern time on June 2, 1980; see 45 FR 26894, April 22, 1980. In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and nonsubstantive nature on the final regulations may be submitted on or before July 18, 1980. The effective date will not be delayed by consideration of such comments.

Comments on the scope and applicability of Executive Order 11990 and Executive Order 11988 to RCRA, UIC, and NPDES permits must be submitted on or before July 18, 1980.

Comments on requirements for Class IV wells must be received by July 15, 1980.

There will be a hearing on the requirements for Class IV wells on July 8, 1980, from 9 a.m. to 5 p.m.

ADDRESSES: Comments of a technical and nonsubstantive nature, as well as the comments concerning the scope and applicability of Executive Order 11990 and Executive Order 11988, should be addressed to: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460.

Comments on requirements for Class IV wells should be addressed to: Alan Levin, Director, State Program Division (WH-550), Office of Drinking Water, Environmental Protection Agency, Washington, D.C. 20460.

The Public Hearing on Class IV wells will be held at: HEW Auditorium, 330 Independence Avenue, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Edward A. Kramer, Office of Water Enforcement (EN-336), U.S. Environmental Protection Agency, Washington, D.C. 20460, (202) 755-0750.

SUPPLEMENTARY INFORMATION:

Background

These final regulations consolidate requirements and procedures for five EPA permit programs. These regulations represent the major product of the Agency's permit consolidation initiative that began in the fall of 1978. They are based on the proposed consolidated permit regulations that were published in the **Federal Register** for comment on June 14, 1979 (44 FR 32854).

EPA program requirements and State program requirements are established for three programs:

- The Hazardous Waste Management (HWM) program under the Resource Conservation and Recovery Act (RCRA);
- The Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA);
- The National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA); and

State program requirements only are established for:

- State section 404 "Dredge or Fill" programs under the CWA.

In addition, procedures for permit decisionmaking are established for the above four programs, and for

- The Prevention of Significant Deterioration (PSD) program under the Clean Air Act, where this program is operated by EPA or a delegated State agency under 40 CFR 52.21(v); these procedures do not apply to PSD permits issued by States to whom administration of the PSD program has been transferred. (See preamble to Part 124, Subpart C.)

These regulations are an important element of an Agency-wide effort to consolidate and unify procedures and requirements applicable to EPA and State-administered permit programs.

The Agency has also developed a single set of permit application forms for the programs covered by these regulations. These consolidated application forms are published elsewhere in today's **Federal Register**. They consist of a single general form to collect basic information from all applicants, followed by separate program-specific forms which collect additional information needed to issue permits under each program. The application forms in today's **Federal Register** include the general information form and the additional forms for certain water discharges under NPDES and for hazardous waste permits under RCRA.

When the draft consolidated application forms were published for public comment, they appeared along with a set of proposed NPDES regulations which were closely related to the contents of the application forms. Those accompanying regulations have now been integrated with the final NPDES regulations which appear as part of these consolidated permit regulations, and are summarized in the proper places in the preamble discussion. For a more thorough discussion and response to comments on those portions of the NPDES regulations, see the preamble to the consolidated application forms published elsewhere in today's **Federal Register**. Because the draft application forms and accompanying proposed NPDES regulations were originally published together, commented upon together, and are closely related, the detailed discussion of both forms and accompanying regulations has been retained in one place.

Many of the requirements in these regulations apply both to EPA programs and to State programs that receive EPA approval to operate in lieu of a Federal program in a particular State. These common requirements are intended to ensure that State permit programs satisfy minimum statutory and

to reflect the new ownership or operational control of the facility, although EPA has attempted to draft these requirements to achieve the least possible burden on property transactions consistent with adequate transfer of permit responsibilities.

First, EPA has retained the essential features of the proposal for NPDES facilities and UIC wells not injecting hazardous waste. Permits for these facilities may be transferred automatically, without requiring any affirmative act by the Director, but only if a written agreement for transfer of permit responsibilities is sent to the Director. The agreement no longer requires specific provisions as to liability for events occurring before and after the transfer, but only an agreement as to liability between the parties. For UIC facilities, the notice to the Director must also demonstrate that the requirements for financial responsibility will be met by the new permittee. Finally, the director must have the opportunity to require that the permit be modified to reflect the change in ownership or operation. In many cases the Director may feel that it is desirable to require the prospective new permittee to submit a permit application; see preamble to § 122.15(b).

For permits that are automatically transferred under this provision, the transfer-based cause for modification or revocation and reissuance (§ 122.15(b)(2)) survives the transfer, so that the Director can later modify the permit to reflect the new realities of the operation without holding up the transfer. However, after an automatic transfer is effective the permit will not be reopened to revoke and reissue the permit unless the permittee requests or agrees. Otherwise, the new permittee would be subject to having its entire permit rewritten at any time regardless of its relevance to the change brought about by the transfer. This is contrary to the certainty which these regulations attempt to give permittees during their fixed-term permits. Of course, the transferred permit may also always be terminated for cause, such as violation of the financial responsibility requirements.

Second, for RCRA facilities and UIC wells injecting hazardous wastes, EPA has determined that in all cases it will be necessary to modify the permits upon transfer of ownership or operational control of a permitted facility or activity. This provision is also applicable to 404 permits. This is necessary because these permits, unlike NPDES permits or certain UIC permits (other than the provisions for financial responsibility), contain conditions which are personal to the permittee and which necessarily must change when the permittee changes. These include such conditions of the permit as the closure and post-closure plans, the contingency plan, and provisions for financial responsibility. In addition, because some of these conditions are incorporated in the permit on the basis of information which is submitted as part of the permit application, in most of these transfers a new permit application will be necessary as well. A new application will always be required when the permit is revoked and reissued. However, there may be some instances, such as a corporate-subsidiary transfer, where the modification would require no substantive changes in permit conditions but merely an updating to reflect the identity of the new owner or operator. In these cases, the transfer could be processed as a minor modification under § 122.17(d) if the Director receives an agreement for transfer of permit responsibilities. EPA believes that such an agreement is necessary even in these situations in order to asure adequate continuity of permit responsibilities.

This provision does not cover transfers of facilities under RCRA interim status. Provisions for such transfers may be found in § 122.23.

Because permittees need to know what provisions apply to permit transfers, final § 122.7(l)(3) now states that "this permit is not transferable to any person except after notice to the Director." The Director shall then proceed under the provisions of § 122.14.

Under this scheme, transfer in itself will no longer be a cause for termination of a permit. Rather, the permit will either be automatically transferred; transferred after a required modification or revocation and reissuance; or the permit will not be transferred but will remain with the prior owner or operator of the facility, and the new owner or operator of the facility will be subject to enforcement for operating without a permit.

EPA believes that in some instances final § 122.14 may be less burdensome than would have been possible in the proposal. For example, in the proposal an agreement for transfer of permit responsibilities was necessary in every instance of a transfer of a RCRA permit. In the final version, this is not necessary unless the transfer is to be handled as a minor modification. Also, in the proposed provision for automatic transfers, a new application was required whenever the Director objected to the transfer. Under these final regulations, a permit may be modified without requiring a new application.

§ 122.15 Modification or revocation and reissuance of permits.

EPA has rewritten the permit modification section in two ways as part of the effort (see also §§ 122.9 and 122.13 and accompanying preamble) to provide greater certainty to permittees during the period when they hold permits and thereby make it easier to make business decisions and obtain financing. First, EPA has narrowed the circumstances under which a permit may be modified during its fixed term. Second, EPA has narrowed the scope of the changes that can be made when a permit of fixed but not lifetime duration is reopened during its term.

(1) The causes for modification have been narrowed. Normally, a permit will not be modified during its term if the facility is in compliance with the conditions of the permit. The list of causes for modifying a permit is narrow; and absent cause from this list, the permit cannot be modified. (However, State programs may always be more stringent than these requirements and an approved State program could provide additional causes.) In addition, certain "minor" modifications (§ 122.17) can be made, with the consent of the permittee, absent cause from the list in § 122.15.

First (see § 122.15(a)(1), proposed § 122.9(e)(1)), a permitted facility may change its operations in ways that were not contemplated in the original permit but which require regulation. This is one instance when compliance with a permit should not insulate the permit from modification. While in many cases a change in operations will violate the permit (giving rise to cause for modification under § 122.15(b)(1)), in other cases activities not limited in the permit will arise after the permit was issued. If permits could not be modified for such reasons then permits would have to be written to prohibit all activities not specifically limited in the permit. With such a requirement permittees would never be sure what the scope of permissible activities is under their permits. (State 404 permits, however, authorize only a specific activity for what is normally a short period of time and activities not authorized in the permit are prohibited; see § 123.97(b).) For NPDES, see the related causes for modification discussed below under § 122.15(a)(5)(viii) and (ix). Permittees have a duty to report all changes in the physical facility, and all other changes that may result in noncompliance, under §122.7(l).

1. The owner and operator has obtained all necessary Federal, State, and local preconstruction approvals or permits; and

2a. A continuous on-site, physical construction program has begun or

2b. The owner or operator has entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for construction of the facility to be completed within a reasonable time.

It is intended that the continuous on-site, physical construction program include physical site preparation. Design and other non-physical and non-site specific preparatory activities alone would not constitute on-site, physical construction. Furthermore it is intended that structures or equipment constructed from a permanent part of the facility that are to be used in its own operation, and represent a substantial commitment to construction.

In general if the amount an owner or operator must pay to cancel construction agreements or stop construction exceeds 10% of the total project cost, the loss would be deemed "substantial". Options to purchase or contracts for feasibility, engineering, and design studies would not constitute contractual obligations.

EPA believes this provides an equitable and reasonable approach to facilities constructed prior to the promulgation of the RCRA regulations. A substantial commitment of resources by owners and operators in a period of uncertainty to provide for treatment, storage, and disposal of hazardous waste will not be penalized. All facility construction commenced after promulgation of the new RCRA hazardous waste regulations would be subject to the RCRA permit process.

(2) *Changes in the Facility During Interim Status.* A number of commenters raised questions as to whether a facility could be modified during interim status. Comments stated that facilities should be able to make such modifications during interim status as are: (1) needed to keep the facility in operations, (2) necessary in order to meet the section 3004 standards or (3) needed to insure full beneficial use of the facility. On the other hand is the concern that allowing such changes during interim status would provide a loophole to avoid the requirements for obtaining a permit (as would occur if the modification of an existing HWM facility was tantamount to construction of a new facility), or for submitting less major, but significant changes to a facility to the kind of review and cross-check that a fully effective permit would provide. In response to these comments the final regulation sets forth the following approach to making changes in a facility during the interim status period.

Part A of the permit application basically defines the process which will be used for treatment, storage or disposal of hazardous wastes and the hazardous wastes to be handled at a facility during interim status. In order to make any changes in such items the owner or operator of the facility must submit a revised Part A permit application and in some instances such changes must be approved by the Director.

New hazardous wastes (not previously specified on the Part A permit application) may be handled if the application is revised prior to such a change. No approval of the Director is required in this instance. Furthermore additional quantities of hazardous waste (already specified on the permit application) may be handled at any time within the design capacity of the facility without revising the application.

Increases in design capacity or changes in the processes used at the facility may only be made upon submittal of a revised application and with Director approval. The Director may approve additional processes if he or she finds that they (1) are necessary because of an emergency situation; or (2) are necessary to comply with Federal, State or local laws. The Director may approve increases in the design capacity of the facility if he or she finds that this is necessary because of lack of available capacity at other facilities. In any of these instances the Director may inspect a facility prior to or after such a change and may disapprove a change that would result in a violation of the interim status standards.

Changes in ownership and operational control of a facility may only occur during the interim status period in accordance with the requirements of 40 CFR § 265.150. A revised Part A permit application is required 90 days prior to such a change so that the Director has an opportunity to determine whether such requirements are completed.

Finally, EPA will prohibit any changes to an existing facility during interim status which are so extensive as to amount to the construction of a new facility. Failure to do this would allow avoidance of the requirement that all sources which are in fact physically new go through the full permitting process before construction begins. For this purpose EPA has adopted the practice under the Clean Air Act of designating as a new facility any change that when completed would amount to more than 50% of the capital value of the facility.

The Agency believes that this approach to changes in a facility during interim status will allow reasonable modifications in existing facilities without creating a situation in which the requirements for obtaining a permit are nullified.

EPA believes that this approach represents a legally acceptable resolution to a question which the statute does not address.

Nothing in the statute provides that applicants are bound by their Part A application, and it has never been the practice when Congress requires existing facilities to come under permits to freeze their present patterns of operations until final agency action. Any such rule could have drastic consequences which Congress presumably did not intend, particularly since Congress explicitly recognized that several years might be necessary to process all RCRA permit applications. In addition, those consequences would be predominantly suffered by facilities which, because they are small or well operated, are low on the priority list of the permitting authority. To require affirmative action before such facilities could change their operations would not only be burdensome on them, but would divert the resources of the permitting agency toward such facilities and away from more urgent tasks.

At the same time, EPA does not believe that facilities which have not yet received a RCRA permit should be completely free of specific regulatory requirements. The existence of interim status standards grounded in the statute indicate that Congress intended such facilities to be subject to at least the outlines of the general RCRA scheme. In addition, the requirement to file a permit application as the price of interim status can only mean that the permitting agency can require updating of that application if it ceases to be accurate. Where the updated application indicated that the facility might cease to conform to the general RCRA regulatory scheme, EPA would be free to take enforcement action as these regulations provide.

(3) *Commencement and Termination of Interim Status.* The proposal provided that interim status began at the time the Director advised the applicant that his or her Part A application had been received. Commenters pointed out that under section 3005(e) of RCRA interim status is not granted by the Director, but begins at the time an application is submitted (and after notification under section 3010). EPA agrees with this interpretation and did not intend a different effect under these regulations. The acknowledgment was not an